

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA, :
: 18-CR-00204 (NGG)
:
v. :
: 225 Cadman Plaza East
KEITH RANIERE, et al., : Brooklyn, New York
:
Defendants. : March 14, 2019
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TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government: MOIRA PENZA, ESQ.
MARK J. LESKO, ESQ.
SHANNON JONES, ESQ.
United States Attorneys Office
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant: MARC AGNIFILO, ESQ.
TENY GERAGOS, ESQ.
DANIELLE SMITH, ESQ.
Brafman & Associates
767 Third Avenue
New York, New York 10017

For Allison Mack: WILLIAM F. MCGOVERN, ESQ.
Kore & Kim, LLP
800 Third Avenue
New York, New York 10022

For Kathy Russell: AMANDA RAVICH, ESQ.
Sher Tremonte, LLP
90 Broad Street
23rd Floor
New York, New York 10004

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3 APPEARANCES (Continued)

4

For Lauren Salzman: HECTOR DIAZ, ESQ.
ANDREA S. TAZIOLI, ESQ.
Quarles & Brady, LLP
Two North Central Avenue
Phoenix, Arizona 85004

7

8 For Clare Bronfman: KATHLEEN ELIZABETH CASSIDY, ESQ
Hafetz & Necheles, LLP
9 10 East 40th Street, 48th Floor
New York, New York 10016

10

11 MARK J. GERAGOS, ESQ.
Historic Engine Company No. 28
644 South Figueroa Street
12 Los Angeles, CA 90071

13

Court Transcriber: SHARI RIEMER
14 TypeWrite Word Processing Service
211 N. Milton Road
15 Saratoga Springs, New York 12866

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1 (Proceedings began at 3:37 p.m.)

2 THE COURT: Hello?

3 MR. DIAZ: Yes, we can hear you. This is -- yes,
4 this is Hector Diaz for Ms. Salzman.

5 THE COURT: All right. My deputy's going to call
6 the case.

7 THE CLERK: Criminal Cause for a status conference,
8 Case number 18-CR-204, United States v. Keith Raniere, Allison
9 Mack, Clare Bronfman, Kathy Russell, Lauren Salzman, Nancy
10 Salzman. Counsel, can you state your name for the record
11 starting with the Government?

12 MS. PENZA: Moira Kim Penza, Mark Lesko, and Shannon
13 Jones for the United States. Good afternoon, Your Honor. I
14 will stay seated per your usual preference.

15 THE COURT: Yes. Yes. Yes, it's easier. All
16 right. Yes?

17 MR. AGNIFILO: Yes, good afternoon, Your Honor.
18 Marc Agnifilo, Teny Geragos, and Danielle Smith for Keith
19 Raniere and we have waived his appearance for today. Thank
20 you, Judge.

21 THE COURT: Okay.

22 MS. CASSIDY: Good afternoon, Your Honor, Kathleen
23 Cassidy and Mark Geragos on behalf of Ms. Bronfman who is
24 seated behind us.

25 THE COURT: All right. Good afternoon.

1 MR. GERAGOS: And good afternoon, Your Honor.

2 THE COURT: Good afternoon.

3 MS. RAVICH: Amanda Ravich for Kathy Russell and Ms.
4 Russell waives her appearance today.

5 THE COURT: Okay. And then on the phone?

6 MR. McGOVERN: Also Bill McGovern.

7 THE COURT: I'm sorry.

8 MR. McGOVERN: That's all right. Bill McGovern
9 for --

10 MR. DIAZ: Yeah.

11 THE COURT: I'm sorry. Hang on --

12 MR. McGOVERN: That's all right.

13 THE COURT: -- one second on the phone. Sorry, go
14 ahead.

15 MR. McGOVERN: For Allison Mack and Ms. Mack has
16 waived her appearance today as well.

17 THE COURT: All right. And then on the phone?

18 MR. DIAZ: Thank you, Your Honor. Hector Diaz and
19 Andrea Tazioli for Lauren Salzman and we waived her
20 appearance.

21 THE COURT: Okay. So we had a busy day yesterday.
22 So this was on for two reasons and some developments seemed to
23 probably affect this, so from my perspective I wanted to see
24 where we are with discovery. That was an issue that was
25 raised by Ms. Salzman's letter and then also by this ongoing

1 question of whether there was going to be a superceding
2 indictment on what the discovery is.

3 So that's happened, so really this is for my -- to
4 help me. It's to make sure where we are with these various
5 motions and how any of the developments of late affect what's
6 going on and then if you have discovery issues. So maybe it
7 would help for -- I'm just going to go over what I think we
8 still have which is the privilege motions. So those are in a
9 few parts.

10 There's the Government's motion at 256, Bronfman's
11 opposition 282, Government had a letter at 361. There's a
12 sealed letter with documents at 363, response at 381, and then
13 NXIVM's letter in response to the questions I had about
14 privilege that's at 382. Then there is Mr. Ranieri's motion.
15 I have just a complete technical administrative question,
16 that's at 269 with an opposition at 300 and then the reply
17 wasn't filed. I have the paper copy.

18 And then we're dealing with the redactions. I'm not
19 sure where we are with that. There's a redaction version
20 at -- let's see. The Government redacted version is at 415,
21 defendant's at 416, but unless we missed it we don't see the
22 reply. Then there was Ms. Bronfman's motions which were at
23 271, 72, 73, 74, 300, 309, 310. We posted the report and
24 recommendation which I think everybody should be able to see
25 now. That's sealed, but I assume that most, if not all of it,

1 will be made public. So I asked you within the next week to
2 let us know if you think anything from that should be sealed.

3 There's another motion to suppress that Judge
4 Garaufis is dealing with and then we had the motion at 381
5 which was a correction of 379, Ms. Salzman's motion to compel.
6 I'm not really sure what happened there because you had
7 completely conflicting views as to what the production had
8 been. The Government responded there at 394. Okay.

9 So still some pending motions that I am dealing
10 with, but since you've had some developments what, if any,
11 affect did those have on what's pending and what happens with
12 discovery on any of these issues, so.

13 MS. PENZA: I think the -- Your Honor, the
14 primary -- based on what you said I think the clearest thing
15 is that the Government's position is that the motion -- Ms.
16 Salzman's motion at Docket 381 I believe you said was the file
17 corrected should be mooted at this point given that she has
18 now pleaded guilty.

19 THE COURT: Okay. So one question is was anybody
20 else interested in the issue she was raising or have a problem
21 along as I don't know?

22 MS. PENZA: Well, they may have to. I -- Your
23 Honor --

24 THE COURT: Well --

25 MS. PENZA: -- our position would be --

1 THE COURT: -- I know.

2 MS. PENZA: -- that they're -- they would not have
3 standing, so --

4 THE COURT: Right.

5 MS. PENZA: -- there would have to be something.

6 MS. CASSIDY: Well, Your Honor, our view is that
7 we're entitled to the Rule 16 discovery just as Ms. Salzman
8 was and so we are -- we can file a motion to revive this if
9 the Government would like, but the issue is still before the
10 court.

11 THE COURT: So there were two parts to that
12 question. One -- and I guess there's now the third. One was
13 just as a question of fact, what had been produced. There was
14 really two completely different versions. One was we don't
15 have anything and then the Government's like you have
16 everything, so. I mean that's --

17 MS. PENZA: And that is the --

18 THE COURT: -- so that was what the week was --

19 MS. PENZA: -- and that is the truth, Your Honor.
20 They got -- they had everything. I understand that a number
21 of counsel choose not to open the FedEx package that came with
22 the drive. The drive had been referenced in a discovery
23 letter in January including Bates numbers and the -- where the
24 materials came from, mainly drives from the Oregon Trail house
25 where Nancy Salzman was. I also had at least direct

1 communication with Mr. Ranieri's counsel about the drive when
2 I went back to my emails. So I don't know what happened, Your
3 Honor, but I sent the tracking numbers for all six drives to
4 defense counsel after -- at their request.

5 So it's certainly concerning to the Government that
6 nobody followed up. Even if they had thought those numbers
7 were missing it should've been raised with us much sooner and
8 it raises concerns about the discovery process and what they
9 are putting before the court.

10 MS. CASSIDY: Your Honor, I think I can speak to
11 that issue. We, at some point apparently received, I believe
12 it was in early December, received a package from a vendor who
13 is not the Government's normal discovery vendor on this case.
14 There was no indication that the package had anything to do
15 with this case and there was no cover letter accompanying the
16 drive.

17 We -- as for my office we thought that it was a
18 drive we were expecting on another case from that vendor and
19 we put it with that case file. And we did not realize until
20 the issue that the Government identified in its letter in
21 response to Ms. Salzman's motion that there had been this
22 production from 3 Oregon Trail.

23 So we dug through our files, found the drive, and
24 have now identified that we have received this material and
25 we've been able to upload it. But if it is the entirety of

1 the 3 Oregon Trail materials then the Government can tell us
2 if it's -- if it's everything and the search is complete.

3 MS. PENZA: Your Honor, you saw the response to our
4 motion. We do not believe we -- that the search hasn't -- is
5 not complete. The search is ongoing, but that -- and -- but
6 we also do not believe that Ms. Bronfman has standing to raise
7 those issues. If she believes she does she should put in a
8 letter to that effect, but it should be very clear on the
9 standing issue.

10 MS. CASSIDY: On the -- I'm not sure I understand
11 the standing issue. I have the right to receive the Rule 16
12 material in this case.

13 MS. PENZA: She has received everything from Nancy
14 Salzman's address and that is the issue we have --

15 THE COURT: All right. We've been talking --

16 MS. PENZA: -- we have talked about.

17 THE COURT: -- about this for the whole time, so I
18 guess we need your letter. If anyone is -- does everybody
19 else have the same concern? And this is this -- I think Ms.
20 Necheles is the first one to articulate this point. The
21 Government's view has been that when everything's produced
22 there's -- among the other arguments that when everything is
23 produced that's enough. And obviously, defendant's view in
24 several different places has been you have to tell us what you
25 are claiming is the product of the search warrant and it's not

1 good enough to say that we've given you everything. Does that
2 -- that's your position?

3 MS. CASSIDY: That's correct.

4 THE COURT: All right.

5 MS. CASSIDY: I believe what the Government is
6 saying is that this drive had the results of the search that
7 they were doing on the 3 Oregon Trail devices.

8 THE COURT: No, I think this is the agreement,
9 right?

10 MS. PENZA: This -- Your Honor --

11 THE COURT: Yeah.

12 MS. PENZA: -- as we put out in our letter what Bob
13 Soloway in his letter on behalf of Nancy Salzman claimed --

14 THE COURT: Yeah.

15 MS. PENZA: -- that there was no evidence that we
16 have done anything other than -- that we -- there was no
17 evidence that we had even begun our search and that all we had
18 done was produce the drives. The Government in response said,
19 no, we've produced 340,000 Bates numbered pages of discovery
20 or something like that. And so that was the response.

21 We certainly did not say, in fact, we said the
22 opposite, we did not say that this was the completion of our
23 search. However, the Government's position is that Rule 16
24 discovery and what is responsive to a search warrant and what
25 are -- what is -- what are trial exhibits, those are three

1 different things. As to --

2 THE COURT: All right. And just clarify --

3 MS. PENZA: -- what is responsive --

4 THE COURT: -- what's on that drive just so
5 everyone's on the same page about what every --

6 MS. PENZA: That is --

7 THE COURT: This is the product of the agreement
8 that you have with Ms. Salzman.

9 MS. PENZA: No, it wasn't, Your Honor.

10 THE COURT: No, what is this? What's on the drive?

11 MS. PENZA: I mean, the agreement with Ms. Salzman
12 enabled us to provide everything to all defense counsel.

13 THE COURT: Okay.

14 MS. PENZA: So they are now in possession regarding
15 Nancy Salzman's devices. I'm using that as shorthand --

16 THE COURT: Right.

17 MS. PENZA: -- of everything that the Government
18 has.

19 THE COURT: Is that what's on the drive --

20 MS. PENZA: No, what is on the drive --

21 THE COURT: -- the drive?

22 MS. PENZA: -- is a subset which is --

23 THE COURT: Okay.

24 MS. PENZA: -- partial results of the Government's
25 search.

1 THE COURT: Okay. So do you have -- I don't know
2 who has what.

3 MS. CASSIDY: So we have -- we have that drive that
4 contains the partial results of the search of --

5 THE COURT: Okay.

6 MS. CASSIDY: -- the 3 Oregon Trail devices. And if
7 the Government, at some point, produces additional materials
8 and we believe it's too late and we were denied rights under
9 Rule 16 then we will move to preclude them from using it at
10 that point. We do believe that there is a point at which the
11 searching must stop.

12 THE COURT: Has to stop. I know. You have this --

13 MS. CASSIDY: We --

14 THE COURT: -- fundamental disagreement.

15 MS. CASSIDY: Yeah.

16 THE COURT: Okay. Does everybody have what the
17 Government says they have produced whether you agree that it's
18 correct or not --

19 MR. AGNIFILO: We believe --

20 THE COURT: -- the Government's positions?

21 MR. AGNIFILO: -- we believe we do.

22 THE COURT: Anybody else?

23 MR. McGOVERN: As do we believe --

24 MS. RAVICH: Yes.

25 MR. McGOVERN: -- that we have it, yes.

1 THE COURT: How about on the phone?

2 MR. DIAZ: Yes, we do, Your Honor.

3 THE COURT: Okay. So do you want to raise an issue
4 by letter that's an extension of what Ms. Salzman had raised
5 or --

6 MS. CASSIDY: Let me take a look at her letter again
7 and see whether there are any issues that are still alive at
8 this point.

9 THE COURT: Okay. All right. Can I just -- on the
10 purely administrative for Mr. Ranieri's motion, there
11 were -- there -- am I right, there wasn't -- there isn't a
12 reply that's been filed or --

13 MS. CASSIDY: You're talking about the motion to
14 suppress, Your Honor?

15 THE COURT: Yes.

16 MS. CASSIDY: The reply was filed on -- it's Docket
17 410.

18 THE COURT: All right. I had a -- I had the paper
19 copy that was delivered. Okay. Is there a redacted version?

20 MS. CASSIDY: The -- 410 is actually unredacted.

21 THE COURT: Okay.

22 MS. CASSIDY: 409 -- yeah, 409 is redacted.

23 THE COURT: Okay. Okay. So discovery issues,
24 things -- are things moving along, not moving along? What
25 does yesterday events -- does it change anything? That was

1 really, I think, Mr. Raniere you're -- for your client, Mr.
2 Raniere, the point about if there's a superceding indictment
3 what does that do to the discovery we had?

4 MR. AGNIFILO: I mean, at this -- at this point
5 we're -- we have 500 jurors coming on April 8th. We're going
6 forward with the trial. And we think we want to know when
7 we're going to have all of the discovery without subcategories
8 and without, sort of, conditions. I mean, this trial is about
9 to begin. And I think that's really the answer that we all
10 want to -- want to know.

11 THE COURT: So for the Government, the discovery and
12 if you think some of this, the answer of what you have to
13 produce, is it tied up with the trial schedule? If you could
14 make that clear.

15 MS. PENZA: Your Honor, the Government has, as we
16 represented to Judge Garaufis last time we were before him we
17 have been producing discovery liberally. We do not believe
18 that there is substantial additional discovery to produce and
19 we are reviewing to make sure that we do produce anything
20 related to the superceding indictment. In particular, we are
21 producing a number of items related to various visa
22 applicants. And we are burning those materials right now and
23 we will be able to send them out either this evening or
24 tomorrow.

25 We are also in receipt of additional materials from

1 NXIVM. We will be producing those as well. There is a -- the
2 drive on which the child pornography that is at issue, the
3 drive from which that was recovered, we did -- we did ask that
4 defense counsel destroy any copies that they had or return
5 them to us. That has -- because it has child pornography.
6 Once we -- once we were alerted to that fact we are making
7 that drive available to defense counsel for review at the FBI.
8 And I -- and Mr. Ranieri's attorneys are coming tomorrow in
9 order to review that.

10 There are a few drives related to the materials that
11 were produced pursuant to the deferred -- the deferred
12 disclosure. We are -- there were some technical issues with
13 our initial disclosure. There are some materials that, from a
14 technical standpoint, we have not yet been able to produce,
15 but we expect to be able to do that this upcoming week. But
16 we have produced what we believe are the majority of the key
17 files from that.

18 So in terms of substantial additional discovery we
19 don't believe that exists. We, obviously, continue to receive
20 materials as we have been doing we will produce those on a
21 rolling basis. We've been making productions every couple
22 weeks, I believe.

23 MR. GERAGOS: Your Honor, if I could respond to
24 that. The -- there was one mention, at least initially, about
25 the visa applicants and the discovery in connection with them.

1 I was going to actually write a letter tonight, but since
2 they've represented they're going to turn over material in
3 connection with that, based on the superceding I'd like to
4 wait and see what they turn over.

5 I may -- hopefully they're going to produce the
6 universe of documents that I think we need, but -- and hope
7 springs eternal. I'm just fearful that it's going to be one
8 set of documents and not another subset that I believe exists.
9 If that's the case I'll alert the court or I'll alert counsel
10 first and see if they've got access to them. I can see where
11 that potentially is going to be a problem based on the
12 superceding.

13 Also, just so the court is aware, and I know you're
14 not handling the severance, I plan on augmenting the severance
15 motion that has already been filed and I believe that there's
16 going to be discovery issues that flow from that as well. But
17 I won't know and I'll wait until Mr. Ranieri's counsel takes a
18 look at -- on their field trip tomorrow with the FBI.

19 THE COURT: Okay.

20 MS. GERAGOS: I guess I would just like to respond,
21 Teny Geragos for Keith Ranieri, with respect to the deferred
22 disclosure that we raised in our letter last week. That was a
23 filing -- the Government has had that in their possession
24 since at least December of last year. They put in a filing to
25 Your Honor December of last year. Their drives that they have

1 and -- are squarely with relevant to the complaint that was
2 filed in March of last year, to the indictment that was filed
3 in April of last year, to the superceding indictment that was
4 filed in July of last year, and now they're having technical
5 difficulties to be able to produce something three weeks
6 before we have jury selection?

7 It should have been figured out before. And quite
8 frankly, there's hours and hours of tapes that we should've
9 had long ago. And I don't know how many more drives are
10 coming, but they should be produced today not any time later
11 in the week. I brought this issue up to the court several
12 times in writing and in our last court appearance.

13 And I don't -- I don't think that they should be
14 able to continue to give us relevant Rule 16 discovery, you
15 know, next week or later this week when we should be having it
16 now. It's relevant. It's -- there's no basis to keep in from
17 us. Technical difficulties when they've had it in their
18 possession for at least since December, it doesn't make sense.
19 It -- they shouldn't be able to introduce it later.

20 THE COURT: So what's the issue?

21 MS. PENZA: Well, that's a different issue. The
22 introduction later, they want to make a motion, make a motion,
23 but I don't think --

24 THE COURT: All right. But what's your explanation
25 given --

1 MS. PENZA: Well --

2 THE COURT: -- that you asked for -- you asked not
3 to have to --

4 MS. PENZA: Because it --

5 THE COURT: Hang on. Let me finish the question.
6 You asked not to have to produce it until much closer to
7 trial. That was granted. Now?

8 MS. PENZA: The drives were on our drive. And when
9 we -- and we assumed there would be no -- we obviously don't
10 make early discovery copies to check the -- whether -- we sent
11 out the discovery thinking that it would work. Unfortunately
12 it did not. That has caused us to need to get new copies
13 ourselves. We have those now and so we are working on
14 replicating them.

15 What I can do is make them available at our office
16 not tomorrow, but first thing next week if that -- because
17 we're already going to be at the FBI on Monday on the other
18 device. And it takes -- we have to have people available in
19 order to actually be with defense counsel. But I can make it
20 available early next week if they want -- wish to inspect them
21 at our office, but I'm hopeful that we will be able to provide
22 them early next week.

23 MR. GERAGOS: Well, thank you. We'll definitely
24 take them up on that, but we definitely will be making a
25 motion as to suppression of this evidence because it should

1 not have been withheld from us. It's squarely within Rule 16
2 and within the indictment -- both indictments.

3 THE COURT: Okay. All right. So it seems like
4 you're having the same discussion that we had last year, which
5 is that -- and many times since, which is that the Government,
6 your belief is that you can continue to search especially
7 since you got the additional warrants in the fall. And
8 defendant's view is enough is enough.

9 So the question is how's that going to get teed up.
10 Are you making a motion to the district judge? What's
11 happening now that we're -- I mean, you don't have to commit
12 on your strategy, but if you know. This has been going on a
13 long time with early December date on the materials that the
14 Government did have as what seemed like a reasonable
15 production date, which then, obviously, the Government got the
16 additional search warrants for which you could be looking for
17 other things in the materials, some materials which you had,
18 some materials which you were looking for from the different
19 service providers, et cetera, so.

20 MR. AGNIFILO: So what I'd say to Your Honor's
21 questions we'll talk among ourselves. I think it probably
22 does make the most sense to tee it up in the form of a motion
23 with Judge Garaufis if you think that's the way to go. I'll
24 follow Your Honor's lead on that.

25 THE COURT: To the extent you have any argument

1 that's it's Rule 16, yes. Whether, you know, it comes back to
2 me that's something for --

3 MR. AGNIFILO: Okay.

4 THE COURT: -- you and I to -- for us to figure out.
5 But it is in the -- I realize the Government's response is
6 going to be that it falls in one category. Yours is obviously
7 that it should be looked at as falling into multiple
8 categories some of which should have already been produced.
9 My point in raising it is your point that trial is coming.

10 MR. AGNIFILO: Right.

11 THE COURT: So --

12 MR. AGNIFILO: Yeah.

13 MS. CASSIDY: Right.

14 THE COURT: -- you know, you already -- there are
15 already other significant motions pending in particular with
16 Judge Garaufis, so I'm sure he'd prefer a heads-up --

17 MR. AGNIFILO: Okay. Well --

18 THE COURT: -- on that's coming.

19 MS. CASSIDY: Your Honor, just with respect to the
20 device that the Government said that they had asked us all to
21 return because of the discovery of alleged child pornography
22 on it and they've now said that they are not going to
23 reproduce the rest of the contents of that device to us, that
24 they're going to make it available for us to inspect at the
25 Government's offices, there are tens of thousands of other

1 files on that drive. And it is not feasible for us to review
2 that at the FBI, so I would ask that they produce the
3 remainder of the files on those drives or that drive to all
4 the defendants so that we can load it into our discovery
5 database and review it like the rest of the documents.

6 MS. PENZA: Your Honor, we are working on the
7 feasibility of that. Obviously, we take child pornography
8 extremely seriously providing even if there are remnants of
9 those files to defense counsel would be its own violation of
10 federal law at that point given that we would know about it.
11 So we have to take that -- we have to be very careful about
12 it.

13 Defense counsel had those materials. If there is
14 something in particular that they are wanting we can try and
15 get them that sooner. But in terms of -- we will hopefully be
16 able to provide the entirety of the drive with those images
17 removed, but we have to make sure it is a full scrub such that
18 those images do not appear anywhere on the drive and so we are
19 in that process.

20 THE COURT: That needs -- well, let me get a better
21 handle on what -- what's on this? Which drive is this? Which
22 one are we talking about here --

23 MS. CASSIDY: This --

24 THE COURT: -- that has these materials the
25 Government's trying to call back?

1 MS. CASSIDY: As far as I'm aware this is a Western
2 Digital Storage device which has been labeled DSCV_00000061.
3 My information, and I'm not sure if this is the entirety of
4 it, but there are at least 34,000 files on this device. I
5 cannot say that we have been -- looked at all of them. We
6 certainly did not see anything that caught our attention as
7 problematic before the Government recalled it. That was news
8 to us.

9 So we did as the Government requested and deleted
10 it, but there are emails. I believe that this device contains
11 the backup of several computers and there are emails and other
12 documents on that hard drive that we need to be able to
13 search. I can't identify to them what materials they are that
14 I'm interested in looking at, but if they would like to
15 segregate the images for now and produce the emails to us, I
16 don't know how they can do it, you know, technologically, but
17 we need that material to be able to search.

18 THE COURT: So does anybody have an idea as to what
19 this 34,000 is besides the claimed child pornography images?

20 MS. PENZA: Your Honor --

21 THE COURT: It was copies of what? I have no idea
22 and you have lots and lots. You have that way back.

23 MS. PENZA: -- it's lots of everything. So we
24 are -- and we are in the process of trying to remove it, Your
25 Honor. I -- there's not anything else we can say. This

1 is --

2 THE COURT: Well, the -- I mean, your answer has to
3 be we're getting -- these are important materials. They need
4 them. I mean, you're -- they're going to trial in a couple of
5 weeks. And while, you know, if this is actually pornography
6 because it's been identified and you want to get a better
7 handle on it than you had, it's not fair to the defendants to
8 not have the materials that they needs, but I don't have any
9 sense of --

10 MS. PENZA: Sorry, I missed --

11 THE COURT: -- what these are.

12 MS. PENZA: I didn't hear what you just -- I missed
13 what you just --

14 THE COURT: If you -- you produced -- as I
15 understand this you produced the materials to them, you
16 realized belatedly it included child pornography. You
17 recalled the devices. These seem to be 34,000 documents, some
18 of which are -- is child pornography and much of which is not.
19 And they're going to trial in a couple of weeks so if there's
20 any way in which this is material that the defendants should
21 have in order to defend the case they need to get it. And
22 you've got to resolve these technical issues really, really
23 quickly because otherwise how is it fair to them not to have
24 these materials. If someone could tell me what they are --

25 MS. PENZA: Your --

1 THE COURT: -- we might have some better, more
2 informed conversation about this.

3 MS. PENZA: I did bring up my chart on my phone,
4 Your Honor. I didn't -- I didn't print it out before, but it
5 does have material related to one of their main cooperating
6 witnesses, so we do need it back as soon as possible.

7 MS. CASSIDY: And, Your Honor, when they recalled
8 the device they represented in the letter that they -- when
9 they asked for it back that they would be reproducing the
10 contents of the drive to us. If they had said, you know, we
11 want it back and you're going to be able to look at it at FBI
12 headquarters, you know, I would've had something else to say
13 about it before giving them the drive back.

14 They could've identified to us the images that
15 needed to be deleted as opposed to everything. Instead we
16 went through, we deleted our copy of the drive. We had our
17 discovery vendor pull everything down and delete it. And so
18 there are more than 34,000 files I believe. I think that's
19 what I had --

20 THE COURT: Files or -- I misspoke then.

21 MS. CASSIDY: No, I --

22 THE COURT: 34,000 --

23 MS. CASSIDY: -- no, I believe that there are 34,000
24 that I had my vendor load which were, you know, maybe email
25 files or other files that I could be interested in. The --

1 I'm not even sure. I didn't load the image files, so I don't
2 even know how many files are on that drive. But as Ms.
3 Geragos said, this is crucial evidence to the defense that we
4 need to be able to see.

5 THE COURT: Can I just understand why is it all as
6 one unit? I mean, you copied some sort of backup that existed
7 and just -- and produced that whole thing or is this a
8 compilation of materials?

9 MS. PENZA: It's a hard drive, Your Honor.

10 THE COURT: So you copied this hard drive and then
11 provided it to them?

12 MS. PENZA: Yes.

13 THE COURT: Why is it technical -- technologically
14 difficult to pull out what I assume you've identified as the
15 files of concern?

16 MS. PENZA: Because there can be -- I am not a tech
17 expert, but because there can be remnants of those files. And
18 we do -- like the idea that Ms. Cassidy, if we had said
19 there's child pornography and she said I'm going to keep the
20 drive anyway, I mean, that's kind of a shocking statement. So
21 we do take it that --

22 THE COURT: That's not what she said. She said she
23 would keep the non-child pornography images --

24 MS. PENZA: But she --

25 THE COURT: -- that she had copied. And you're

1 saying --

2 MS. PENZA: -- she's going to go through and look at
3 the -- for the child pornography? I --

4 THE COURT: Well, I think the practical answer would
5 have been to say to the Government, which I'm sure she
6 would've thought of, that tell me which of the images that
7 you're concerned about. I mean, of what you're saying. You
8 pulled back 34,000 or more --

9 MS. CASSIDY: At least.

10 THE COURT: -- documents or files, I'm not sure what
11 the distinction is here, a couple of weeks before trial
12 because you realize there's a problem. Okay. Now you have to
13 fix the problem. So how quickly are they going to get the
14 "cleaned", in quotes, files.

15 MS. PENZA: I can't give you a specific answer right
16 now, but I will do my best to give the court -- I will give
17 the court an update by tomorrow afternoon if that's
18 acceptable.

19 THE COURT: Is that practical given your FBI visit?

20 MS. PENZA: Well, if it's not, I'm happy to write
21 something and say that I need more time. I was hoping to --

22 THE COURT: I mean, I --

23 MS. PENZA: -- I was hoping that that would be, you
24 know -- that the court would be -- realize that the Government
25 is obviously working diligently to do so. But I don't know

1 that there will be a significant difference between -- in
2 terms of my update of like how and when it can happen. I can
3 try for tomorrow and then otherwise do something early next
4 week if that doesn't work. But I'm happy to update the court
5 either way by tomorrow afternoon.

6 THE COURT: All right. That would be good, but your
7 answer should lean towards we're going to get it to them
8 A.S.A.P. I mean, they need to prepare for trial. If you are
9 in a position or defendants in a position to say this is
10 ancillary material, not as serious as some other things that
11 we're concerned about, that might affect how one would look at
12 this.

13 But these are important papers, what do you expect
14 them to do? I mean they can't keep going to your office or
15 FBI -- wherever it is that this drive is and looking at it.
16 I mean, that's too much for them, too much for you, too much
17 for whoever you're working with. So the plan should be you're
18 going to get them "cleaned", in quotes, documents as soon as
19 possible. And that means soon.

20 Okay. Other issues? Okay.

21 MS. GERAGOS: I have one remaining I wouldn't say
22 issue, but I would ask the court to -- I'm not asking for it
23 now, but as we get closer to trial, once they give us their
24 witness list to tell us which documents by Bates number each
25 of their witnesses produced.

1 THE COURT: I have no idea what -- so what happened
2 with the -- even the production? I thought we sort of --

3 MS. GERAGOS: The --

4 THE COURT: -- had a tracking -- I mean, I don't
5 have those charts with me, but I thought there was an
6 association of custodian, owner, however --

7 MS. GERAGOS: Well, there's --

8 THE COURT: -- someone was being described. And --

9 MS. GERAGOS: -- a chart -- well, there's charts
10 with respect to the Oregon Trail and 8 Hale devices, and of
11 course with, you know, the search warrants they executed for
12 the Yahoo and Gmail accounts, but with respect, and I'm not
13 asking for it now, I'm asking for it after we get a witness
14 list, who produced what because the Bates numbers don't
15 reflect who produced what. They're either VDM NXIVM or their
16 just NXIVM Bates numbers. So we think we're entitled to that,
17 so I would ask for that in order reflecting that.

18 MS. PENZA: Your Honor, we will produce 3,500
19 material, Giglio and Jencks Act material. I'm not sure if
20 there's something specific that Ms. Geragos is concerned about
21 and we can obviously confer about that. But I'm certainly not
22 going to agree to that right now. I have never heard of that
23 being done and so, I'm -- and it also would be an incredibly
24 onerous process given how much has been produced at this
25 point. I don't know -- like given witness -- it just doesn't

1 necessarily make sense to me and so maybe it's not -- maybe
2 it's because this is coming up for the first time right now.

3 THE COURT: Okay. Why don't you talk about it
4 because I'm not quite sure what you're looking for because I
5 thought --

6 MS. GERAGOS: Yeah, the --

7 THE COURT: -- the materials were generally tracked
8 and the sources were generally tracked. And devices, I don't
9 know if you --

10 MS. GERAGOS: Sources, meaning devices, are
11 generally tracked. But if the Government issues a subpoena on
12 a person and that person turns over materials to the U.S.
13 Attorney's Office they're producing it to us with Bates
14 numbers either saying NXIVM or VDM NXIVM. So there's no -- we
15 don't have any idea who's producing what to the Government.
16 Whereas normally they're produced -- either the Government
17 will tell us in past cases that we've had or it's produced,
18 you know, with the initials of that person.

19 I'm happy to talk with the Government about it and
20 bring it up later in writing, but we believe that we'd be
21 entitled to the source of the documents if the -- if the
22 Government is going to introduce certain documents through
23 witnesses that the -- that witness has provided.

24 THE COURT: All right. Why don't you talk because I
25 think it would help if we knew what set you think is not

1 identified.

2 MS. CASSIDY: Right. I think, Your Honor, over the
3 past several weeks we received a number of productions from
4 the Government. And we will get a file and open it up and it
5 has a lot of pictures in it and emails. And it's not clear to
6 us where this comes from. There might be pictures -- screen
7 shots of a phone. I don't know who's phone it is. I don't
8 know -- the Government has not identified in any way where
9 this material is coming from.

10 So this close to trial we're trying to prepare,
11 obviously, and think about who the witnesses are. I don't
12 think -- I think this doesn't come up a lot because normally
13 it's clear where it's coming from. The Government identifies
14 it in some way to the defendants. And so I don't think
15 there's anything secret about this. If they're going to want
16 to use it at trial they're going to have to tell us, you know,
17 who the custodian is if they're going to want to put it in.
18 So I -- maybe we can work it out amongst ourselves, but I
19 think that's the issue that Ms. Geragos identified.

20 MS. PENZA: Your Honor, I think the answer is it
21 depends. I mean, I don't -- I think a lot of things that
22 are --

23 THE COURT: I mean --

24 MS. PENZA: Your reaction to me -- I'm sorry, Your
25 Honor, but I do. I really think it depends. I think there

1 are things were the authenticity is, you know, if it's an
2 email and the witness is being called to testify and they
3 produced -- they gave us the email, I'm just not even sure
4 what this -- what this exercise is designed to do.

5 If there are things -- if it's a screen shot and
6 we're calling the person who's screen shot it is that will --
7 that seems obvious. I think I am actually missing what their
8 concern --

9 MR. GERAGOS: Let me give them a --

10 MS. PENZA: -- is and so I really --

11 THE COURT: All right. Let's try again --

12 MS. PENZA: -- think we should try and --

13 THE COURT: -- to make sure we understand.

14 MR. GERAGOS: The way I --

15 THE COURT: What's --

16 MR. GERAGOS: Let me just give an example --

17 THE COURT: Okay.

18 MR. GERAGOS: -- because I've started to open this
19 stuff up. You have no idea where it comes from. If they call
20 a witness and there is -- there are items in the discovery
21 that we would want to use whether it's for an impeachment,
22 whether it's to authenticate, whether we'd want to admit, we'd
23 have no idea because I've got a universe or a sea of documents
24 that have been produced which is great, but I don't know who
25 to link it to. I don't know when the witness comes and gets

1 on the stand did this stuff get produced by this witness, did
2 it get produced by somebody else. And I -- can you imagine
3 coming in and saying, Judge, timeout --

4 THE COURT: No.

5 MR. GERAGOS: -- I need two weeks to go comb through
6 all of this so I know whether or not this witness -- this is
7 like a throwback to the days when they used to produce the
8 discover after the direct examination.

9 THE COURT: That's before my time.

10 MR. GERAGOS: It's not before my time,
11 unfortunately.

12 THE COURT: I don't know.

13 MR. GERAGOS: But then I used to get boxes of
14 discovery after they finished direct. And they'd throw it on
15 the desk and I'd say I need a continuance for three hours so I
16 can figure out what I've got.

17 THE COURT: Okay. So to get back to your example,
18 you're getting, what, screen shots that don't have numbers or
19 you don't know what the number is?

20 MS. CASSIDY: They have numbers, but we don't know
21 where it came from.

22 THE COURT: You don't know whose number it is?

23 MS. CASSIDY: We don't know who took it. They know
24 who took it. We don't know who took it.

25 MS. GERAGOS: There are several screen shots where

1 it's clear who they're talking to, but maybe not clear where
2 they're -- where it's coming from. So there are screen shots
3 were I know -- you know, text message shots where I do know
4 who it's between because I can put two and two together in
5 some instances, but in some instances I can't.

6 MR. AGNIFILO: The problem -- so the last couple
7 cases we had with the Eastern District, I mean, now in the
8 Schiralli and the Venditto Mangano case, the Bates stamp on
9 the bottom tended to indicate the source. So, like, if
10 something came from the Town of Oyster Bay it would be TOB and
11 a number, so just to give an example. And so, it's -- and I'm
12 not saying they have to do it in any particular way, it's they
13 do it however they do it, but --

14 THE COURT: But you have the information of the
15 source of the doc.

16 MR. AGNIFILO: You have the -- yeah, you have
17 the --

18 THE COURT: Right.

19 MR. AGNIFILO: -- information for the source. And
20 it -- and it tends to come up a lot, you know, I mean, because
21 things come up during the trial and, you know, there's a
22 sidebar or there's an issue and you try and figure out oh,
23 where did these documents come from. And rather than someone
24 through the dark, you know, when there's some witness on the
25 stand to be forewarned is to be forearmed in this kind of

1 instance and I'm assuming the Government knows.

2 I mean, I'm not asking them do to -- you know, to go
3 back and investigate, but I assume that they know where these
4 things came from. So if it's just a matter of telling us what
5 they already know I think we save a lot of aggravation later
6 by knowing now. I don't know how it's going to be relevant.
7 It might be relevant, it might not be relevant, but it is
8 information we've tended to get just through anecdotally the
9 way that the number is -- appears on the document.

10 THE COURT: All right. But you're -- you as the
11 custodian or the person who produced certain records is
12 material that you're entitled to know because you're entitled
13 to be able to challenge the authenticity of documents and
14 understand how they would be used for -- at or on direct or
15 impeachment. And without it --

16 MR. AGNIFILO: Right. Right. That's right.

17 THE COURT: -- you can't really work with the
18 document.

19 MR. AGNIFILO: Correct.

20 THE COURT: So just so I understand the scale of
21 this you're -- what I had talked to you all about was mostly
22 information that seemed like it was identified because you
23 knew it was from whichever location, Oregon Trail or some
24 other place, and you know whose it was, and so it made sense.
25 And now, like, is this -- this is, what, the last couple of

1 productions? How many -- what are we talking about --

2 MR. AGNIFILO: So I'm trying to think.

3 THE COURT: -- a couple of pages, thousands of
4 pages?

5 MR. AGNIFILO: I'm trying to think of a way to make
6 this sort of situation manageable. I mean, there's two things
7 that could happen. We could try to figure out what we don't
8 know and go to them and say hey, we want to know where this
9 stuff comes from and presumably they would know the answer.
10 And that might be the best solution.

11 An easier solution for us would be that they --
12 since they already know the answer already that they just tell
13 us in the first instance. But let me -- let's talk and we'll
14 talk with them and --

15 THE COURT: All right. So why don't you talk.

16 MR. AGNIFILO: -- see if we can resolve this.

17 THE COURT: By when do you think you could --

18 MS. PENZA: Your Honor --

19 THE COURT: -- know whether there's an issue or not?

20 MS. PENZA: -- I can respond, though, to that. I
21 mean, we have produced millions -- over -- like --

22 THE COURT: Right.

23 MS. PENZA: -- that is not feasible with the current
24 trial date for us to go through discovery and identify every
25 piece of discovery. A lot of this --

1 THE COURT: Okay. Wait. Wait. Hang on a second,
2 though. It doesn't sound like you have the issue for every
3 piece. It's these -- I'm trying to -- that's why I'm --

4 MR. AGNIFILO: It's not every piece.

5 THE COURT: Sorry, let me just --

6 MR. AGNIFILO: It's not every piece. And sometimes
7 like --

8 THE COURT: It's the recent productions that you're
9 saying don't have --

10 MR. AGNIFILO: It --

11 THE COURT: -- obvious associations, is that what it
12 is?

13 MR. AGNIFILO: -- it's not a matter of the recency.
14 It's --

15 THE COURT: Okay.

16 MR. AGNIFILO: But it's sporadic. For the -- very
17 often, yes, something's from 8 Oregon Trail, it's from 8
18 Oregon Trail. We don't need to be told that again. So I
19 think what probably might make the most sense to see if we can
20 do it this way, we -- one of the issues that Ms. Cassidy
21 raised is we -- you know, we're working with a discovery
22 program and that's why it's so hard to go to the FBI because
23 we can't incorporate the program.

24 Maybe there's a way of sort of spitting this out.
25 This is stuff I don't know anything about. This is -- Teny

1 will shake her head one way or the other and say you're nuts,
2 which could possibly happen. We might be able to --

3 THE COURT: Isolate --

4 MR. AGNIFILO: -- zero in on this stuff --

5 THE COURT: -- what you're concerned about?

6 MR. AGNIFILO: -- you know, and see this is the
7 stuff we don't know where it's from. And then say hey, ten
8 percent, five percent we don't know where it's from, can you
9 just tell us where it's from.

10 THE COURT: Okay. When could you make that request
11 to the Government so that they can look into it and/or decide
12 what they're -- what they want to do and then if you still
13 have a problem let me know?

14 MS. GERAGOS: By -- we'll do it by Monday.

15 THE COURT: All right. And when you see it you can
16 figure out what your turnaround time.

17 MS. GERAGOS: Well, do it with using their discovery
18 letters so that it's easily tracked.

19 THE COURT: All right. So then I'll leave it to
20 you, defendants, to raise if there's a problem after you talk
21 to the Government.

22 MR. AGNIFILO: Very good.

23 THE COURT: Other issues?

24 MS. JONES: Your Honor, on -- this is Shannon Jones.
25 I just wanted to raise one thing about the privilege review

1 process. When you listed the items that you had you mentioned
2 that you had Ms. Bronfman's February 21st, 2019 letter which
3 related to the items that were in dispute from our first two
4 productions of material that we thought --

5 THE COURT: Do you have the -- do you have the -- I
6 have it by docket number, not date, in front of me.

7 MS. JONES: I don't have it by docket --

8 THE COURT: Okay.

9 MS. JONES: -- number, which is why I wanted to give
10 you the dates. Because --

11 THE COURT: Okay.

12 MS. JONES: -- for the privilege review materials I
13 have not been filing things on the docket because if -- even
14 if I file it ex parte and under seal because I would be filing
15 it on behalf of the Government I can't ensure that I could say
16 for sure that no one else from the Government team could
17 access it. And the idea --

18 THE COURT: Oh. Uh-huh.

19 MS. JONES: -- is that they not access it. So there
20 is the February 21st letter that Ms. Bronfman filed, the
21 Government's initial response of February 27th. Then they had
22 filed a follow-up letter regarding -- on March 4th regarding
23 just the redaction issues. The Government had proposed
24 providing a redacted copy of the first two letters to the
25 Government team and hopefully that could be filed on the

1 docket under seal. And then the Government had a actually a
2 follow-up response to that redaction --

3 THE COURT: What --

4 MS. JONES: -- rejection which was dated March 6th,
5 2019, which I don't think you referred to.

6 THE COURT: Okay.

7 MS. JONES: So I --

8 THE COURT: I'll look back again.

9 MS. JONES: -- brought a paper copy if you'd want
10 it, but I had emailed a copy, but I did not file it on the
11 docket because, again, for the reasons I discussed that I
12 can't -- I can't say that that would mean that it would be
13 only accessible to their --

14 THE COURT: Right. I understand.

15 MS. JONES: -- privilege review team.

16 THE COURT: If you have an extra copy I'll take it,
17 but -- all right. So 221, 227, 34, 36?

18 MS. JONES: Yeah, so here is --

19 THE COURT: Okay.

20 MS. JONES: -- the basic letter.

21 THE COURT: Okay.

22 MS. JONES: And, Your Honor, the Government --

23 THE COURT: Yeah.

24 MS. JONES: -- we also provided on Tuesday, we
25 provided the next list of documents that we have marked as not

1 privileged and we provided that list to defense counsel and
2 asked them to review it and let us know if they have any
3 additional objections so we can keep the process rolling
4 forward.

5 MS. GERAGOS: Your Honor, I have an issue with that.
6 They produced to us for the first time on Tuesday. This is
7 the first batch we've received since many weeks ago when we
8 were engaging in this process and we went through the briefing
9 and there were the first three batches that we then moved on
10 any documents that we were not able to agree on.

11 We, on Tuesday, received a batch of more than 5,000
12 documents. At this point before trial it is very difficult
13 for us to take the time to go through and go back -- have the
14 same back and forth with the team. Many of these documents
15 are also -- they relate to some of the same issues that are
16 currently before Your Honor on the motion that's fully
17 briefed. I don't think that it's a good use of their time or
18 our time --

19 THE COURT: Right.

20 MS. GERAGOS: -- to spend, you know, these remaining
21 weeks fighting about the same categories of documents which
22 are also apparently not related in any way to the superceding
23 indictment which has now come out.

24 THE COURT: Related to what was in it before or to
25 the new charges when you say not related?

1 MS. GERAGOS: Either.

2 THE COURT: Either.

3 MS. GERAGOS: Not related to either.

4 MS. PENZA: Your Honor, well, that's not what the
5 privilege review team is doing. We're not -- we're not
6 gearing up based on whatever the trial team is doing. We're
7 just doing the -- moving forward with the privilege process.
8 We had been reviewing -- we are reviewing documents. We're
9 reviewing documents ongoing because it's a lot of stuff to go
10 through. And if we don't mark something not privileged that
11 appears to be not privileged that means we end up reviewing it
12 again next time we do it. So we are -- whenever we see
13 something not privileged we marked it not privileged.

14 And we had been sitting on things waiting to see if
15 some of the prior issues were going to resolved. Then we
16 would know how that was going to be handled. But we
17 didn't -- at a certain point we're like we've just got to get
18 this out. We've got to keep moving forward which is why we
19 pushed out that last batch on Tuesday.

20 THE COURT: You'll hear from them when you hear from
21 them. I don't -- what relief do you want? You're just saying
22 you're not going to -- it's not going to be at the top of your
23 list of things to do, right?

24 MS. GERAGOS: That's correct.

25 THE COURT: All right. Well, maybe once the -- we

1 finish the privilege decision that might help.

2 MS. GERAGOS: And -- right. And at a certain point,
3 I mean, I think Your Honor is --

4 MS. PENZA: Your Honor, then we need a new process.
5 We need a new process. They can't just choose now -- first of
6 all, Ms. Bronfman is talking about filing additional severance
7 motions. So we're operating in this world where other people
8 -- where she may not be going to trial in three weeks, and
9 that is the truth. And so she shouldn't get to sit on this
10 and such that the Government has still not been able to review
11 these emails.

12 THE COURT: You can't. I mean, this is not going to
13 be a successful argument for the Government. The Government
14 has not produced things quickly relative to the amount of time
15 that you had it. And it may be a long, slow, deliberate
16 process to go through things, but to say that the defendant's
17 counsel needs to turn something around extremely quickly in
18 the face of trial when the severance motion hasn't been
19 decided and given yesterday's events, as was suggested, we'll
20 have additional material supplemented, it's not a realistic
21 request balancing all of the efforts that everybody is making.
22 So --

23 MS. PENZA: Well, then, Your Honor, in terms of a
24 ruling regarding what is before the court, because that would
25 be a way for us to turn --

1 THE COURT: And we'll get to it. We just dealt with
2 the one motion. There's another one. And we'll see what
3 happens.

4 MS. PENZA: And I understand that, Your Honor, but
5 we -- even the other defendants haven't -- like haven't
6 received those materials.

7 THE COURT: Yeah. It all takes time and there are
8 priorities. So you'll get a decision when you get a decision,
9 but you're not going to be able to force the defendants in the
10 next couple of days to respond to your 5,000 page -- is that
11 what it is, 5,000 documents?

12 MS. PENZA: No, we gave them an --

13 THE COURT: I don't know what it is.

14 MS. PENZA: -- we gave them an Excel sheet and the
15 Excel sheet identifies the Bates number, the date, the two,
16 the -- it basically looks like a privilege log is what it is.
17 It's just generated by identifying if there's file name what
18 the file name is, so it's just a list of documents. And this
19 is for all defendants.

20 About half of the documents are from devices that
21 were Nancy Salzman was the custodian of and the other -- the
22 other half, I think, are split between Mr. Raniere and Ms.
23 Bronfman. And that was one of the other reasons why I had
24 wanted to be able to give redacted copies of these motions
25 papers to the Government and presumably if it would be filed

1 under seal then at least maybe the other defendants would see
2 it because right now we're having like a one on one dialogue
3 with one defendant about privilege that she's asserting on
4 behalf of NXIVM which impacts all of the defendants here.

5 So I just -- I don't think that if we remove the
6 privilege content as I had suggested in my redactions, which I
7 think were pretty conservative, then at least people know what
8 we're talking about even if they don't -- they're not entitled
9 to access of the content. But again, most of the privileges
10 asserted are being asserted on behalf of NXIVM by a person who
11 may or may not have standing to make those arguments.

12 MS. GERAGOS: And NXIVM's counsel has been involved
13 and is aware of the privileges that are being asserted and
14 agreed with them. And just on the Nancy Salzman point, so now
15 there are documents that are identified as Nancy Salzman
16 documents. I don't have those documents because those are
17 isolated as privileged material that are -- that is Nancy
18 Salzman's.

19 Nancy Salzman has pled guilty. That doesn't mean
20 that there is no privilege because the privilege is likely
21 NXIVM's. So NXIVM's counsel is going to have to review all of
22 the Nancy Salzman documents and determine whether they want to
23 assert a privilege on those just to clarify.

24 MS. PENZA: Well, NXIVM's not going to trial. So I
25 don't understand why NXIVM's counsel, who is NXIVM is, again,

1 the privilege holder for, I think, the majority of these
2 documents. I don't know why that counsel cannot be working on
3 the privilege review because he's not representing a defendant
4 in this case.

5 THE COURT: I have no idea what he's doing except
6 occasionally being on the phone calls. Anybody know? I mean,
7 I don't know where he's looped into your discussions.

8 MS. PENZA: Your Honor, frankly I think given where
9 we are and given what the Government understands regarding
10 NXIVM, that NXIVM's counsel should be directed to assert how
11 they are not defunct at this point because that's what
12 we -- that is in large part what we're running into. His
13 counsel --

14 THE COURT: Okay.

15 MS. PENZA: -- saying we -- you know, the president
16 of NXIVM just pleaded guilty yesterday, Your Honor. I don't
17 know what NXIVM is and I think there's a good chance that it
18 is actually defunct and that there is no privilege --

19 THE COURT: All --

20 MS. PENZA: -- as to anything.

21 THE COURT: -- subs and the -- you know --

22 MS. PENZA: Yes.

23 THE COURT: -- whatever. Obviously NXIVM Mexico
24 came up. So your position is what, there is no corporation?

25 MS. PENZA: Yes. I mean, as far as I can tell there

1 is none. I don't -- when I speak to Mike Sullivan about who
2 is making privilege calls it is totally unclear. After
3 everyone was indicted it was like, hm, I have nobody to speak
4 to. And then he is saying he doesn't have any money to
5 represent the case if he -- if the -- if the fund is running
6 out.

7 And so when you're hearing that from the attorney
8 for NXIVM that there's no money, there's no people, that seems
9 like a defunct organization at this point. And then we could
10 really clear the decks on this because most of the privileges
11 are NXIVM's and we could just wipe that clean.

12 THE COURT: All right. I didn't know things were at
13 that situation.

14 MS. GERAGOS: My understanding from Mr. Sullivan is
15 not that he said I have nobody to speak to, but he declined as
16 a matter of privilege to tell Ms. Penza who the client -- who
17 was the representative NXIVM he was speaking too. He said
18 something completely different.

19 MS. PENZA: Your Honor, this is one of the points
20 that was discussed in the privilege motion. There was
21 this -- the -- we -- I talked about in this about who was the
22 privilege holder and what happens when a corporation is no
23 longer in business and what showing the corporation would have
24 to make to assert privilege.

25 And I think just being able to -- for an attorney to

1 walk in and say I'm not going to tell you who the privilege
2 holder is or who's instructing me, I don't -- I don't think
3 you can -- I don't think they meet their burden of showing
4 that they -- that they have a valid privilege by doing that.
5 And to be totally frank, Your Honor, it sounds like it's Ms.
6 Cassidy. And so that's the situation we find ourselves in.

7 MR. AGNIFILO: Your Honor?

8 MS. PENZA: And, so I think NXIVM should have to
9 make the showing.

10 MR. AGNIFILO: Your Honor, if I -- if I could
11 without --

12 THE COURT: Okay.

13 MR. AGNIFILO: -- Mr. Sullivan's a former United
14 States Attorney. He knows what he's doing.

15 THE COURT: He's also not here --

16 MR. AGNIFILO: He's not on the call.

17 THE COURT: -- so I don't want to go too far down
18 this line.

19 MR. AGNIFILO: So, yeah, I would like to try and
20 sort of stop this if we could.

21 THE COURT: And we could order the transcript, but
22 it's -- all right. But we got the Government's view maybe
23 NXIVM doesn't exist any more in a way that it can assert a
24 privilege. Did anybody else want to say anything on the
25 record about that?

1 MR. AGNIFILO: No, just that -- I mean, we'll bring
2 Mr. Sullivan into the discussions and I'll have a lot more to
3 say about these things than we do.

4 THE COURT: Okay.

5 MS. PENZA: Your Honor, the Government does have
6 one more issue --

7 THE COURT: Okay.

8 MS. PENZA: -- regarding 8 Hale. Last time we
9 raised our concerns regarding the maintenance of the
10 confidentiality of documents and who is saying that the
11 confidentiality of the -- of the documents at 8 Hale was
12 maintained where no one is asserting a privacy interest in 8
13 Hale. Anyone who could possibly is not asserting that privacy
14 interest and there has been nothing filed yet. And these are
15 additionally --

16 THE COURT: Yeah.

17 MS. PENZA: -- thousands of documents, Your Honor.
18 So I understand that the -- that the court is not pleased with
19 the Government's pace, but this is something that we asked and
20 then if there is no privilege there that's more, thousands and
21 thousands of documents, many of which I believe given the way
22 this case works it is possible that there could be duplicates
23 on those devices which would eliminate a lot of the privilege
24 review that Ms. Jones is doing on the other devices.

25 MS. CASSIDY: Your Honor --

1 THE COURT: Anybody else want to say anything about
2 8 Hale?

3 MS. CASSIDY: -- just to be clear one of the
4 potential places where the privileged documents would be would
5 be on the device that the Government recalled and has not
6 returned to us.

7 THE COURT: I lost you on that one. I'm sorry.

8 MS. CASSIDY: The --

9 THE COURT: The one that -

10 MS. CASSIDY: -- 8 Hale -- one of the 8 Hale devices
11 which has more than 34,000 files on it is the device -- the
12 hard drive that the Government --

13 THE COURT: That's where that hard drive was from?
14 Okay.

15 MS. CASSIDY: -- took back.

16 THE COURT: All right.

17 MS. CASSIDY: So we have not had access to those
18 documents for the last several weeks if there is a privilege
19 argument to be asserted there.

20 THE COURT: All right. Well, you'll be getting
21 something back soon, so.

22 MS. PENZA: It's not about -- but, Your Honor, I
23 just want to be clear, I don't think there's anything to do
24 with the content at this point. We -- the Government concedes
25 that there -- from my conversations with Ms. Jones that there

1 are documents that -- on the 8 Hale devices that that drive,
2 other drives, that would hit on the same type of NXIVM
3 privileged terms --

4 THE COURT: Right.

5 MS. PENZA: -- individual privilege terms that we've
6 been talking about. That is not the issue, Your Honor. The
7 issue is whether there was -- whether the maintenance of the
8 confidentiality was there such that the privilege still holds.

9 THE COURT: All right. All right. Anything else?

10 MR. AGNIFILO: Nothing from us, Judge.

11 THE COURT: All right. To be clear though, you
12 know, you suggest I'm not happy with the Government's case. I
13 don't have a view. What I do have a view about is having
14 enough resources for you to be able to do what you need to do.
15 It seems to me everybody here is working very hard. But, you
16 know, you've been working hard for, I don't know, you're
17 coming on a year and certainly six months for everybody else,
18 but it's always been, at least since the arrest, that the --
19 mister -- at least some defendants were going to go to trial
20 fairly quickly.

21 So, you know, with all this work everybody should be
22 able to have what they need to put on the case for the
23 Government and put on the defense for the defendants if that's
24 what they want or at least to oppose the Government's case.
25 And there is a lot of pressure in getting it done, so, you

1 know, my concern has been that you have enough resources and
2 if you don't that you get them because -- you know, defendants
3 are entitled to a fair trial.

4 All right. Anything else? All right.

5 MR. AGNIFILO: No, thank you, Judge.

6 THE COURT: Thanks.

7 MR. AGNIFILO: Thank you, Your Honor.

8 THE COURT: Have a nice day.

9 MR. GERAGOS: Thank you.

10 THE COURT: Thanks.

11 (Proceedings concluded at 4:34 p.m.)

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1 I certify that the foregoing is a court transcript
2 from an electronic sound recording of the proceedings in the
3 above-entitled matter.

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6 Shari Riemer, C.E.T.**

7 Dated: March 15, 2019
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